

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

INA PERCIVAL, *an individual and resident of the
State of Washington,*

Plaintiff,

v.

LAINA POON, *an individual and resident of the
State of Washington,*

Defendant.

Cause No: 2:20-cv-01040-JCC

PLAINTIFF'S OPPOSITION TO DEFENDANT'S
SECOND FRCP 12 (b) 6 MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM AND FOR
FAILING TO COMPLY WITH THE COURT'S
ORDER

TO: United States District Court Western District of Washington Court Clerk
TO: Noah Davis, Attorney for Defendant

**PLAINTIFF'S RESPONSE TO DEFENDANT'S SECOND MOTION TO DISMISS
AND FAILURE TO COMPLY WITH THE COURT'S COURT ORDER**

COMES NOW the Plaintiff, Ina Percival ("Plaintiff"), by and through her attorney of record, Edward C. Chung and the law firm of CHUNG, MALHAS & MANTEL, PLLC., and hereby respectfully files with the U.S. District Court Clerk and serves upon Defendant's counsel of record, Plaintiff's Opposition to Defendant's Second FRCP 12 (b) 6 Motion to Dismiss for Failure to State a Claim and for Failure to Comply With the Court's Order. Defendant, Lana Poon. While Defendant has correctly points out that this Court dismissed Plaintiff's federal and state claims; the Honorable Judge Coughenour March 15, 2021 Court Order [ECF 17] provided *Plaintiff leave to amend the dismissal of her state and federal claims*



1 “without prejudice”. Following this Court’s March 15, 2021 Court Order, *Plaintiff timely filed her*
2 *Amended Complaint on March 29, 2021 [ECF# 18] and specifically amended the factual averments*
3 *contained in her July 2, 2020 Complaint [Dck#1] to conform with the “deficiencies identified” in the*
4 *Court’s March 15, 2021 Court Order*. The language of the March 15, 2021 Court Order reads:

6 For the foregoing reasons, the Court GRANTS Ms. Poon’s
7 motion to dismiss and DISMISSES Ms. Percival’s
8 complaint without prejudice. Ms. Percival may amend her
9 complaint to address the deficiencies identified above
10 within fourteen days of the date of this order

11 See, the Honorable Judge Coughenour March 15, 2021 Court Order
12 [ECF 17]; *emphasis added*.

13 While this Court dismissed Plaintiff’s state claims of: (1) Civil Assault; (2) False Imprisonment;
14 (3) Intrusion Upon Seclusion; and (4) Defamation on the premise these state claims “do not arise out of
15 the same nucleus of operative facts as Plaintiff’s claim that Defendant violated the Electronic
16 Communications Privacy Act (“ECPA”) of 1986, 18 USC §2520, *et. seq.*” the Court did not dismiss me
17 these claims without prejudice. Pursuant to FRCP 41 (2), unless a court order provides otherwise, “*a*
18 *dismissal under this paragraph (2) is without prejudice.*” See, FRCP 41 (2); *emphasis added*. Here, the
19 Court did not dismiss Plaintiff’s claims with prejudice, to the contrary, it specifically provided that
20 dismissal was made without prejudice.

21 In consideration of the foregoing, Plaintiff amended her Complaint to address, wherein it was not
22 provided before in Plaintiff’s initial Complaint, how Plaintiff’s civil assault; false imprisonment; intrusion
23 upon seclusion, and defamation relate in time and factual context to Plaintiff’s ECPA claim. As indicated
24 in Defendant’s Second Motion to Dismiss for Failure to State a Claim, her motion is a facial attack on the
25 underlying claims contained in Plaintiff’s Amended Complaint. Defendant states, “ Ms. Poon accepts
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1 sufficiently plead facts as “true”. See, Page 2, Line 9 of Defendant’s Second FRCP 12 (b) 6 Motion to
2 Dismiss for Failure to State a Claim and for Failure to Comply With the Court’s Order[ECF # 19]. As
3 this Court points out in its March 15, 2021 Court Order, this is significant in light of the fact that all
4 averments by Plaintiff must be accepted by this Court to be true. See, *Ashcroft v. Iqbal*, 129 S. Ct. 1937,
5 1949 (2009); *emphasis added*. Ergo, Plaintiff’s Amended Complaint specifically alleges how her state
6 claims, both in context of time and facts related to her federal ECPA claim. While Plaintiff acknowledges
7 her July 2, 2020 Complaint [Dck#1] may not have addressed how the audio recording related to her state
8 claims, Plaintiff has now amended her Complaint to satisfy the “identified deficiencies” that the Court
9 addressed in its March 15, 2021 Court Order. Again, under Federal Rule of Civil Procedure 8(a)(2), a
10 pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to
11 relief.” The pleading standard FRCP 8 announces does not require “detailed factual allegations,” See,
12 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *emphasis added*. “To survive a motion to dismiss, a
13 complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
14 plausible on its face.’” *Iqbal*, 129 S. Ct. at 1949. In reviewing a Defendant’s motion, this Court must
15 accept all factual allegations in the complaint as true and draws all reasonable inferences from those facts
16 in favor of the plaintiff. See, *Al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009). Although Rule
17 12(b)(6) does not require courts to assess the probability that a plaintiff will eventually prevail, the
18 allegations made in the complaint must cross “the line between possibility and plausibility of entitlement
19 to relief.” *Iqbal*, 129 S. Ct. at 1949.

20 As evidenced in Plaintiff’s Amended Complaint, she alleges very detailed and specified facts in
21 support of all her claims. At this initial stage, Plaintiff need not try the case on the pleadings. While
22 Defendant appears to take the position that Plaintiff is required to prove her case at this juncture, not case



1 law recognizes such argument or imposes such burden on the Plaintiff at such an early state of the
2 proceedings. As stated before, much of Defendants' arguments related to factual averments go to matters
3 that are outside the initial pleadings and warrant discovery. The claims alleged by Plaintiff are factually
4 plausible and wherein if this Court accepts as true and draws all reasonable inferences from those facts in
5 favor of the plaintiff, then Defendant's Motion for Summary Judgment must be dismissed. The proof is
6 in the pudding so to speak and if Defendant believes that Plaintiff is unable to establish her *prima facie*
7 case after discovery, then she may move forward with filing a Motion for Summary Judgment. At this
8 juncture however, Defendant has not filed an Answer and Affirmative Defense nor engaged in any
9 discovery.
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12 In consideration Defendants reliance on extrinsic facts, pursuant to FRCP 12(d), a Rule 12(b)(6)
13 motion to dismiss may be converted into a Rule 56 motion for summary judgment if matters beyond the
14 pleadings are presented to and considered by the court. *See, Exxon Corp. v. Md. Cas. Co.*, 599 F.2d 659,
15 661 (5th Cir. 1979). As this Court may be aware, prior to conversion from FRCP 12 (b) 6 to FRCP 56, all
16 parties must be given notice and a reasonable opportunity to present all material pertinent to the motion.
17 *See, Smith 's Estate v. Tarrant Cnty. Hosp. Dist.*, 691 F.2d 207, 208 (5th Cir. 1982). In the case at bar,
18 Defendant has not filed an answer or asserted any affirmative, nor have FRCP 26 initial disclosures taken
19 place wherein a motion for summary judgment is judicially ripe for consideration. That aside, Defendant's
20 makes a number of concessions in her motion to dismiss that are detrimental to Defendant's motion for
21 dismissal.
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24 **IV. CONCLUSION**

25 Based on the foregoing, Plaintiff respectfully asks that this Court deny Defendant's second motion
26 to dismiss pursuant to FRCP 12 (b) 6 and for this Court to judge this matter on the merits.
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1 *Respectfully submitted this 3rd day of May , 2021.*

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3 **CHUNG, MALHAS & MANTEL, PLLC.**

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5 /s/ Edward C. Chung

6 Edward C. Chung, WSBA # 34292

7 Attorney for Plaintiff, Ina Percival
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1 **V. DECLARATION OF SERVICE**

2 I, Edward C. Chung, counsel of record for the Plaintiff, declare under penalty of perjury under the laws
3 of the State of Washington that I caused copies of Complaint to be served using the United State District
4 Court Electronic Case Filing ("ECF") System which shall provide automatically provide electronic
notice to to Defendant's following counsel of record:

5 **Noah Davis**
6 **In Pacta PLLC**
33530 1st Way S. Suite 102
7 Federal Way, Washington 98003
8 *nd@inpacta.com*

☐ Legal Messenger
☐ Hand Delivered
☒ USDC ECF Filing System
☐ Facsimile
☐ First Class Mail

9
10 *Respectfully submitted this 3rd day of May , 2021.*

11
12 /s/ Edward C. Chung
13 Edward C. Chung, WSBA # 34292
14 Attorney for Plaintiff, Ina Percival

